

STATE OF MICHIGAN
COURT OF APPEALS

SEVENTH DAY ADVENTISTS,

Plaintiff-Appellee,

v

CITY OF FREMONT,

Defendant-Appellant.

UNPUBLISHED

May 29, 1998

No. 200633

Newaygo Circuit Court

LC No. 95-015281 CZ

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

Defendant city appeals as of right from a judgment in favor of plaintiff in the amount of \$16,500, together with costs and interest. We reverse.

The parties stipulated that on or about February 20, 1994, approximately forty-one inches of sewage and/or storm water flooded the basement of plaintiff's Fremont Seventh Day Adventist Church. As a result of the flooding, the church sustained damages of \$16,500. At the time of the flooding, plaintiff's plumbing fixtures and pipes were properly connected to the sanitary sewer system, which is owned and operated by defendant.

The trial court decided the case based on the record submitted and the stipulated facts. The court concluded that the forty-one inches of liquid that flooded plaintiff's basement was sewage that came from defendant's sanitary sewer system, and that the trespass-nuisance exception to governmental immunity was applicable because plaintiff established (1) a trespass or nuisance, (2) a physical intrusion, and (3) that the sanitary sewer system is owned, operated, and totally controlled by defendant. Based on the court's findings, judgment was entered in favor of plaintiff.

On appeal, defendant argues that the trial court erred in finding that plaintiff had established that the trespass-nuisance exception to governmental immunity was applicable. Trespass-nuisance is defined as "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988) (op of Brickley, J.). Negligence is not an element of trespass-nuisance. *CS&P, Inc v Midland*, ___ Mich App ___; ___

NW2d ____ (No. 192303, issued 3/31/98). Rather, the elements are: condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government). *Id.* At issue in this case is the third element -- causation or control.

In order to fall within the trespass-nuisance exception as defined by *Hadfield*, the intrusion must have been “*set in motion* by the government or its agents. . . .” *Hadfield, supra*, p 169. In this regard, this Court has found that an intrusion which was not the natural and likely necessary result of the defendant’s conduct, but was instead the result of an intervening cause, was not “set in motion” by the defendant and was not actionable under the trespass-nuisance exception to governmental immunity. *Peters v Dep’t of Corrections*, 215 Mich App 485; 546 NW2d 668 (1996).

Here, there was no evidence that the defendant’s sewage system “set in motion” the flooding of plaintiff’s basement. The evidence showed that the sewage system in the area of the church was designed and constructed to acceptable standards. The actual capacity of the system was considerably greater than the normally anticipated amount of sewage, and the system had no identifiable physical or mechanical defects. In short, the evidence showed that the factor causing the sewage backup was not a faulty system. Rather, it was an intervening cause: a combination of two feet of melting snow and three inches of rain flowing into the normally adequate system within a matter of six to eight hours. In the absence of evidence that defendant set in motion the flood of plaintiff’s basement, the trial court erred in finding that the case fell within the trespass-nuisance exception to governmental immunity.

Reversed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad